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No. 79-1161

In the Supreme Court of the United States

OCTOBER TERM, 1979

SAINT JOSEPH'S HOSPITAL HEALTH CENTER,
PETITIONER

v.

BLUE CROSS OF CENTRAL NEW YORK, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-3) is not reported. The opinion of the district court (Pet. App. A-6 to A-33) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1979. The petition for a writ of certiorari was filed on January 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the public disclosure of cost reports submitted to the Department of Health, Education, and Welfare pursuant to agency regulations by certified Medicare providers is "authorized by law" within the meaning of the Trade Secrets Act, 18 U.S.C. 1905.

STATEMENT

Petitioner St. Joseph's Hospital Health Center, which is a certified provider of services under the Medicare Act (Title XVIII of the Social Security Act, 42 U.S.C. 1395 *et seq.*), brought this suit in the United States District Court for the Northern District of New York to enjoin the Secretary of Health, Education, and Welfare and the Secretary's fiscal intermediary, Blue Cross of Central New York, Inc., from disclosing the hospital's 1978 cost reports to a labor union.[1] The union had requested the reports pursuant to an HEW disclosure regulation, 20 C.F.R. 422.435.[2] Petitioner claimed that the proposed disclosure of its cost reports was prohibited by the Trade Secrets Act, 18 U.S.C. 1905.[3] The district court disagreed, holding

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[1]Cost reports containing detailed financial information must be filed with fiscal intermediaries by hospitals participating in the Medicare program in order to receive reimbursement for services rendered to program beneficiaries. 42 U.S.C. 1395g; 20 C.F.R. 405.453.

[2]20 C.F.R. 422.435 provides:

> The following shall be made available to the public under the conditions specified:
>
> * * * * *
>
> (c) Upon request in writing, cost reports submitted by providers of services pursuant to section 1815 of the Act [42 U.S.C. 1395g] to enable the Secretary to determine amounts due such providers.

[3]18 U.S.C. 1905, which is reproduced at Pet. App. A-36, essentially provides criminal sanctions against government employees who disclose to any extent "not authorized by law" any "confidential statistical data, amount or source of income, profits, losses or expenditures of any person * * * [or] corporation * * *."

that disclosures pursuant to the regulation are "authorized by law" within the meaning of Section 1905 (Pet. App. A-6 to A-33). The court of appeals affirmed (Pet. App. A-2 to A-3).

ARGUMENT

The decision of the court of appeals is correct and is fully consistent with the only other court of appeals decision that addresses the issue, *St. Mary's Hospital, Inc.* v. *Harris*, 604 F. 2d 407 (5th Cir. 1979). Review by this Court is therefore unwarranted.

1. The Trade Secrets Act bars only disclosures "not authorized by law." 18 U.S.C. 1905. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 294-309 (1979), holds that a disclosure regulation has the force and effect of "law" within the meaning of the Act where: (i) the regulation is a substantive rule; (ii) it is promulgated in compliance with applicable procedural requirements; and (iii) it is promulgated pursuant to legislative authority delegated by Congress.

20 C.F.R. 422.435 satisfies these criteria. The regulation is "substantive" because it governs "the public's right to information * * * and the confidentiality rights of those who submit information." *Chrysler Corp.* v. *Brown*, *supra*, 441 U.S. at 303. The regulation was promulgated in accordance with the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. 553, and the Secretary set forth his reasons for issuing the regulations after considering these comments. See 40 Fed. Reg. 17849-17852, 27648-27651 (1975). Finally, the regulation was promulgated pursuant to legislative

authority delegated to the Secretary in 42 U.S.C. 1306(a), which provides (Pet. App. A-36 to A-37; emphasis added):

> (a) No disclosure * * * of any file, record, report or other paper, or any information, obtained at any time by the Secretary of Health, Education, and Welfare * * * or by any officer or employee of the Department of Health, Education, and Welfare * * * in the course of discharging their respective duties under this [Act] * * * shall be made *except as the Secretary of Health, Education, and Welfare * * * may by regulations prescribe* * * *.

Although generally protective of the confidentiality of information submitted to HEW, this statute plainly grants the Secretary discretion to promulgate regulations authorizing public disclosure.[4] Accordingly, the disclosure of the cost reports governed by the regulation is not barred by the Trade Secrets Act because, as the court of appeals held, their disclosure is "authorized by law" within the meaning of that statute (Pet. App. A-2 to A-3).

2. Petitioner contends (Pet. 5) that this Court should grant certiorari because the court of appeals' decision conflicts with various district court decisions that are currently on appeal. Petitioner asserts (Pet. 9-10) that a conflict in the circuits is likely to arise and that its resolution cannot wait due to "time constraints." The short answer to this contention is that there will be time enough for this Court to review the issue if in fact a conflict ever develops. There is, moreover, a strong likelihood that no conflict will develop because all but

[4]As the Fifth Circuit noted in *St. Mary's Hospital, Inc.* v. *Harris*, *supra*, this interpretation of the statute is supported by legislative history and judicial construction. 604 F. 2d at 410 nn.8, 9.

three of the district court decisions cited by petitioner (Pet. 6-9, 11 n.2)[5] were decided prior to *Chrysler* and turned on the erroneous assumptions that the Freedom of Information Act prohibits the disclosure of information that falls within Exemption 4 (5 U.S.C. 552(b)(4)) and/or that agency regulations cannot afford "authori[zation] by law" for the disclosure of information within the ambit of the Trade Secrets Act. Those decisions cannot stand in light of *Chrysler*. Furthermore, the three post-*Chrysler* cases cited by petitioner (Pet. 8-9) will not reach the courts of appeals without further district court proceedings, because each involved a remand for further fact findings by the Secretary.[6] Therefore, review by this Court on the ground of divergent district court decisions would be premature.

[5]The three decisions are *St. Anthony's Medical Center, Inc.* v. *Califano*, No. 79-171-C (S. D. Ind. Oct. 19, 1979); *Hospital Affiliates International, Inc.* v. *Califano*, No. 77-3088 (N.D. Ill. Jan. 28, 1979); and *Washington Hospital Center* v. *Mutual of Omaha*, No. 78-2485 (D.D.C. June 25, 1979).

As petitioner recognizes (Pet. 11 n.1), a number of district court decisions both before and after *Chrysler* are in accord with the Second Circuit's decision in this case.

[6]For this reason the Secretary has moved to dismiss her notice of appeal to the Seventh Circuit filed in *St. Anthony's Medical Center, Inc.* v. *Califano, supra* (No. 79-2554), and has not taken appeals in *Washington Hospital Center* v. *Mutual of Omaha, supra*, or *Hospital Affiliates International, Inc.* v. *Califano, supra*.

3. Petitioner's additional contention (Pet. 10-13) that the court of appeals' decision should be reviewed because the Secretary's disclosure regulation is "arbitrary and capricious" and poses a serious threat to the financial stability of the hospital industry is without merit. In the notice-and-comment proceedings held prior to the promulgation of the regulation, hospital spokesmen asserted that the disclosure of cost reports would cause irreparable harm to the industry, but the Secretary found that the industry had offered no evidence in support of that assertion. After weighing these unsupported claims against the public interest in the disclosure of Medicare cost information, the Secretary concluded (40 Fed. Reg. 27649 (1975)):

> The reimbursement of provider costs, the amount of which is determined through analysis of cost report data, is a public business, and, as such, the records involved in the process of implementing this part of the program should be public records. Providers participating in Medicare and submitting such reports received a total of $6,821,463,000 for fiscal year 1973. An expenditure of public funds of this magnitude carries with it a corollary that the public assure itself the funds are properly paid.

Since the Secretary received the industry's comments and made a rational judgment as to the competing interests involved, the regulation is not "arbitrary or capricious" and does not constitute an "abuse of discretion." 5 U.S.C. 706(2)(C). See *St. Mary's Hospital, Inc.* v. *Harris*, *supra*, 604 F. 2d at 410.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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